Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

1978-79 TERM

No. 78-1219

David E. Morrill, Appellant,
v.
Harvey Wollman, Governor of the State of South Dakota, Appellee.

On Appeal From the Supreme Court of the State of South Dakota

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

THE OPINION BELOW

The memorandum decision of the Supreme Court of the State of South Dakota including a dissenting opinion is reported at __S.D.__, 271 N.W.2d 356 (1978), and appears herein as Appendix A. No other written opinions have been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is an appeal from an original proceeding before the South Dakota Supreme Court (the highest appellate court in South Dakota) which was commenced by Appellant against the Governor of South Dakota to determine Appellant's eligibility to complete his term as a member of the South Dakota Board of Regents. At issue in the proceeding is Appellant's contention as alleged in his Petition for Writ of Prohibition filed with the Supreme Court of South Dakota that the portion of South Dakota Compiled Laws ("SDCL"), Section 13-49-2 which prohibits him and approximately 41% of the state's population who reside in institutional counties from serving on the Board of Regents violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The South Dakota Supreme Court, in its memorandum decision of November 7, 1978, held that SDCL 13-49-2 is constitutional.

(ii) Appellant seeks review of the judgment of the South Dakota Supreme Court entered November 7, 1978, a copy attached as Appendix B. In that judgment the Supreme Court declared that a vacancy existed on the South Dakota Board of Regents and that Appellant had forfeited his office as a member of said Board. Appellant filed a Petition for Rehearing on November 13, 1978 and the South Dakota Supreme Court denied a rehearing by Order on the same date, a copy which is attached

as Appendix C. The Notice of Appeal was filed with the Clerk of the South Dakota Supreme Court, the Court possessed of the record, on November 17, 1978. A copy of said Notice of Appeal is attached as Appendix D.

(iii) Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. § 1257(2). Appellant has no further right of appeal to any court in the State of South Dakota.

(iv) Cases sustaining the jurisdiction of this Court are:

Hadley v. Junior College District, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed2d 45 (1970);

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed2d 225 (1971);

Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed2d 586 (1970).

(v) The full text of SDCL 13-49-2 is as follows:

"The regents who are regular members shall be persons of probity and wisdom and selected from among the best known citizens, residents of different portions of the state, none of whom shall reside in the county in which any state educational institution is located, all of whom shall not be members of the same political party. The regent who is a student member shall be a student

of one of the public, post-secondary educational institutions of the state under the control of the board of regents. Such student member shall be a person who is not a resident of the county in which the institution he attends is located." [emphasis supplied]

Appellant questions the constitutionality of that portion of SDCL 13-49-2 which is underlined above.

QUESTIONS PRESENTED BY THE APPEAL

The following question is presented by this appeal:

Does that portion of SDCL 13-49-2, which prohibits 41% of South Dakota's population who reside in counties in South Dakota where a state educational institution is located from serving on the Board of Regents, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE FACTS OF THE CASE

David E. Morrill, Appellant, was appointed to the South Dakota Board of Regents on January 30, 1975 by then Governor Richard F. Kneip for a six-year term. Appellant was thereafter confirmed by the South Dakota Senate, qualified, and has since served as a Regent. At the time of his appointment, Appellant was a resident of Meade County, having his home at Sturgis, South Dakota.

On August 28, 1978, Appellant, a lawyer, moved his residence and established a branch office of his Sturgis law firm at Rapid City, South Dakota wherein a state institution under the jurisdiction of the Board of Regents is located.

The distance between Sturgis, Appellant's former home, and Rapid City, his new home, is only 28 miles.

Appellant's move raised a question concerning his elgibility to continue as a member of the Board of Regents because SDCL 13-49-2 prohibits Regents from residing in a county in which any state institution is located.

The Board of Regents of South Dakota consists of 7 voting members and 1 non-voting student member, all appointed by the Governor subject to the confirmation by the State Senate. The institutions under the control and jurisdiction of the Board of Regents are the University of South Dakota, the main campus of which is in Clay County; South Dakota State University, the main campus of which is in Brookings County; Northern State College, the main campus of which is in Brown County; Black Hills State College, the main campus of which is in Lawrence County; South Dakota School of Mines and Technology, the main campus of which is in Pennington County; Dakota State College, the main campus of which is in Lake County; the University of South Dakota at Springfield, the main campus of which is in Bon Homme County; School for

the Visually Handicapped, the main campus of which is in Brown County; and the South Dakota School for the Deaf, the main campus of which is in Minnehaha County.

SDCL 13-49-2 prohibits South Dakota citizens residing in the above counties from being eligible for appointment to the South Dakota Board of Regents. These disqualified citizens total 282,980 persons, or over 41% of the total population of the State of South Dakota.

The South Dakota Board of Regents was created by the South Dakota Constitution and has been controlling public higher education in South Dakota since statehood, as well as the State's School for the Visually Handicapped and School for the Deaf. For fiscal year 1979 the Board will control the expenditure of state appropriated funds in the amount of approximately $58 million or 31.2% of all funds appropriated by the South Dakota Legislature for that fiscal year. When non-appropriated funds are included, the Regents will control the expenditure of over $100 million for fiscal year 1979.

Appellant was declared ineligible to continue serving on the Board of Regents because he changed his legal residence to Pennington County, which contains the main campus of the South Dakota School of Mines and Technology. In the South Dakota Supreme Court, Appellant challenged the constitutionality of that portion of SDCL 13-49-2 which prohibits persons living in

"institutional" counties from being appointed to or serving on the Board of Regents. Appellant specifically alleged that the statute violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in that it established arbitrary classifications among South Dakota's citizens and bore no rational relationship to a ligitimate legislative purpose.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

(i) The deprivation is significant.

While this appeal directly involves Appellant's equal protection rights under the federal constitution, the rights of a significant number of South Dakota citizens are also affected. The challenged portion of SDCL 13-49-2 prohibits 283,000 persons or over 41% of the total population of the state from serving on the Board of Regents.

The disqualified persons bear the same state tax burden and should have the same concern for opportunities in higher education and for the care and training of the deaf and visually handicapped as do those persons residing in the "non-institutional" counties. Yet, because of their county of residence, they are prohibited from sitting on a board which determines where a great portion of their money is going to be spent.

The South Dakota Board of Regents

does have control over a significant portion of public expenditures in South Dakota. The Board directly controls the expenditure of approximately $58 million of state appropriated funds for fiscal year 1979. This equals 31.2% of all funds appropriated by the South Dakota Legislature for fiscal year 1979. When non-appropriated funds are included, the Regents control the expenditure of over $100 million.

(ii) The South Dakota Supreme Court did not properly apply the holding of the United States Supreme Court in Turner v. Fouche.

That portion of SDCL 13-49-2 which prohibits persons residing in institutional counties from serving on the Board of Regents violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It divides citizens of South Dakota into two distinct but totally arbitrary classes: the over 41% of the citizens residing in institutional counties who cannot serve on the Board of Regents and the 59% of the citizens residing in non-institutional counties who may serve on the Board. The distinction between the classes is solely one of residence, and classifications based solely on geographical factors are inherently arbitrary and capricious.

In Turner v. Fouche, 397 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970) the United States Supreme Court applied the

Equal Protection Clause to an appointed position on a local school board in Georgia. Georgia law required that to be eligible for appointment to a local school board, a person must own land in the school district. The Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment, all persons had the right to pursue and hold public office, and the state could not interfere with that right without having a valid state objective nor deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.

> "We may assume that the appellants have no right to be appointed to the Taliaferro County board of education. But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory qualifications. The State may not deny to some che privilege of holding public office that it extends to others on the basis of distinctions that violate the federal constitutional guarantees." 396 U.S. at pps. 362-3, 24 L.Ed.2d at p. 580

The Supreme Court went on to examine the Georgia law to determine if "the challenged classification rests on grounds wholly irrespective to the achievement of a valid state objection." 396 at p. 362, 24 L.Ed.2d at p. 580. The Court concluded that the statute was wholly irrele-

to a valid state objective and declared the statute unconstitutional as a violation of equal protection.

Although the holding in Turner v. Fouche, supra, was briefed and argued to the South Dakota Supreme Court, the Court made no attempt to distinguish the holding nor did it even mention the case in its memorandum opinion of November 7, 1978.

The challenged portion of SDCL 13-49-2 is rendered unconstitutional under the Turner holding. Under that holding Appellee had the burden of showing a rational relationship between the prohibition of serving on the Board and the legitimate legislative purpose. Appellee suggested that the prohibition was valid because a person residing in an institutional county would be biased in favor of the state educational institution located in that county and would interfere in the operations of the institution. Appellee's proof of these positions consisted of affidavits of the opinions of a state legislator and a former Regent. Appellant, on the other hand, offered the affidavit of Ralph J. Brown (all affidavits were accepted as evidence upon stipulation) which is attached hereto and incorporated in the Appendix as Appendix E. Dr. Brown, an economist at the University of South Dakota, indicated that in his expert opinion there was no correlation between bias and the county of resident of an individual.

The argument for a rational relationship is based upon a number of assumptions, including:

1. All persons within an institutional county would be so biased in favor of that institution or be subject to such pressure so as not to be qualified to serve on the Board of Regents.

2. All persons within an institutional county possess the same interests and the aspirations for that institution.

3. All persons residing outside institutional counties are free of this bias toward a particular institution or pressure from that institution.

4. The influence of a socio-economic center containing an institution follows county boundaries.

Appellant's evidence proves that all of these assumptions are false. A Pennington County rancher residing 60 miles from the School of Mines is disqualified from serving on the Board of Regents, but a resident of Meade County living just 3 miles away from the School of Mines would be eligible. A person living in Meade County 14 miles from the campus of Black Hills State, or living in Butte County 8 miles away is eligible, but a resident of Lead and Deadwood in Lawrence County 15 to 20 miles away is ineligible.

A Sioux Falls businessman living in greater Sioux Falls in Lincoln County, a

short distance from the School for the Deaf is eligible, but a person 15 miles away in Dell Rapids or Humboldt is ineligible. One can live approximately 10 miles from Aberdeen, Brookings, Vermillion or Springfield and be eligible to serve on the Board, yet persons living at greater distances are ineligible.

The classification becomes arbitrary and without any rational basis (i) when it prohibits a person living in Pennington County from serving on the state school board to assist the governance of the State's schools for the deaf and visually handicapped just because Pennington County contains a state engineering school; (ii) when it allows a person such as Appellant, a past president of the University of South Dakota Alumni Association to serve on the Board as long as he lives in Meade County, but prohibits him to serve if he lived in Minnehaha County, the home of the School for the Deaf; (iii) when it arbitrarily classifies large groups of people as ineligible to seek and hold public office because of an assumption that all would be biased and unable to function just because of where they chose to live with no consideration for occupation, alma mater, educational qualifications and other considerations which may have way more bearing on that person's ability to serve than the location of his home.

The classification is arbitrary and without a rational basis if for no other reason, it prohibits persons from serving

on a public board because that person may have an interest in at least a part of the program under the control of that board. When have we in this country prohibited perople from serving on boards because they may have an interest in government? It is irrational to assume that because people in an institutional county may have an interest in the programs of that institution that that interest makes that person bias and unable to be an effective board member.

The challenged law is irrational because the involvement of higher education is in every county in the state as shown by affidavit of Gordon Foster marked Appendix F and attached hereto. (This was admitted into evidence by stipulation.)

The challenged law sweeps with too broad a brush, and as a result wrongfully interferes with the rights referred to in Turner v. Fouche, supra -- to be "considered for public office".

In summary, the challenged portion of SDCL 13-49-2 establishes an arbitrary classification between South Dakota citizens. It disenfranchises almost half of South Dakota citizens from eligibility to sit on a board which controls the expenditure of over one-third of all state-appropriated funds. Because this classification amounts to invidious discrimination and because there is no rational relationship for the classification, it is a direct violation of the Equal Protection Clause as the holding in Turner v. Fourche, supra.

CONCLUSION

This appeal raises the fundamental question of equal protection of the law. The determination of this question is of importance to all South Dakotans, especially those who are presently ineligible to serve on the South Dakota Board of Regents. In light of the holding of the United States Supreme Court in Turner v. Fouche, and the fact that this holding was not followed by the South Dakota Supreme Court, the issue should be considered by the United States Supreme Court at this time.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

****

DAVID E. MORRILL,
Petitioner,
vs.

HARVEY WOLLMAN, Governor of the State of South Dakota,
Respondent.

****

ORIGINAL PROCEEDING

****

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OPINION FILED November 7, 1978

#12580
DUNN, Justice.

This case involves an original proceeding before this court regarding a dispute over a seat on the Board of Regents. On January 30, 1975, petitioner Morrill was appointed to the Board of Regents for a six-year term. At the time of his appointment, Morrill was a resident of Meade County, South Dakota. On August 28, 1978, Morrill moved his residence to Pennington County and subsequently filed an application for a writ of prohibition. The application was filed in anticipation that respondent Wollman, the Governor of South Dakota, was going to declare a vacancy as a result of the change of residence and name a replacement for Morrill. Such a declaration would be declared pursuant to SDCL 13-49-2, which discusses residency in a county in which a state educational institution is not located as a qualification for the Board of Regents.

Wollman filed an answer to the application for a writ of prohibition and counterclaimed for a writ of quo warranto challenging Morrill's right to hold office. In the counterclaim, Wollman alleges that as a result of Morrill's change or residence Morrill forfeited his seat thereby creating a vacancy and the Governor of South Dakota is required by statute to fill vacancies on the Board of Regents. Wollman further alleges that since the change of residence Morrill has been and is now wilfully usurping, intruding into

and unlawfully holding and exercising his office without any right, authority, or legal justification therefor.

On October 3, 1978, we declined jurisdiction over the application for a writ of prohibition and exercised jurisdiction over the counterclaim for a writ of quo warranto. A full hearing before the Court was held during regular session on October 18, 1978.

The first issue before us is whether the residency qualification for members of the Board of Regents is a continuing requirement. The statute in question is SDCL 13-49-2 and reads in pertinent part as follows:

> "The regents who are regular members shall be persons of probity and wisdom and selected from among the best known citizens, residents of different portions of the state, none of whom shall reside in the county in which any state educational institution is located, all of whom shall not be members of the same political party."

Morrill argues that this provision sets only the initial qualifications for selection to the Board of Regents and, since it is not a continuing requirement, does not govern the creaton of a vacany. Wollman argues that the provision's qualifications constitute a continuing requirement for regents.

The obvious difference of opinion regarding the effect of a change in residency on a vacancy prompts us to ascertain the intent of the legislature. The wording of the provision appears to dictate that regular members be selected from counties in which state eductional institutions are not located. Our interpretation of the provision, however, requires the conclusion that such a qualification cannot be limited merely to the time of selection but must be continuing in nature during the term following the particular regent's selection. Any other conclusion would be totally illogical and render the provisions nugatory. Counsel for Morrill admitted during oral argument that the legislative intent was to proscribe members of the Board of Regents from serving while residing in an institutional county. The legislature has repeatedly considered bills to remove the requirement that regents not reside in counties in which state educational institutions are located, and it has consistently expressed a desire to maintain the requirement by refusing to adopt such legislation. If the legislature prescribes qualifications for a particular appointive office, those qualifications must be deemed to be continuing unless the legislature expressly declares otherwise.[1] Therefore, we hold that the

1. For example, SDCL 3-7-1 provides for a State Police Civil Service Commission consisting of five members, "not more than three of whom shall be members of the same political party at the time of their appointment in the same congressional district." (emphasis added)

residency requirement provided in SDCL 13-49-2 is a continuing qualification for members of the Board of Regents.

The second issue presented is whether the residency requirement in SDCL 13-49-2 violates the equal protection of the law guarantees prescribed in the Fourteenth Amendment of the United States Constitution and Article VI, § 18 of the South Dakota Constitution.[2] We are first met with a challenge to Morrill's standing to question the constitutionality of a statute under which he was appointed, served and paid. In Collins v. Siewert, 1939, 66 S.D. 477, 285 N.W. 518, this court held that "[w]here a party has accepted the benefits of a law, he cannot question its validity." We still

2. United States Constituion, Amendment Fourteen, reads as follows:
"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
South Dakota Constituion, Article VI, 6 18, reads as follows:
"No law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations."

deem this to be a sound policy of the law where the petitioner's challenge only involves his personal right to hold a public office. Morrill, however, attacks the constitutionality on the grounds that the law discriminates against a substantial portion of the citizens of the state who live within institutional counties. This raises a question of public importance as opposed to a personal right to hold office; it is reasonbly capable of repetition if not clarified; and strict adherence to the Collins decision would probably proscribe any method of appellate review. Thus, we deem it appropriate to consider the constitutional issue raised by Morrill.

Our review of the constitutionality of any statute carries with it a presumption of the validity of the statute, and we will not hold a statute unconstitutional unless its violation of constitutional dictates is "so plain and palpable to admit of no reasonable doubt." McDonald v. School Bd. of Yankton, 1976, S.D., 246 N.W.2d 93,97, quoting In re Hinesley, 1967, 82 S.D 552, 150 N.W.2d 834. The two-part test utilized when a statute is called into question because of an alleged denial of equal protection is as follows: (1) whether the statute sets up arbitrary classifications among various persons subject to it and (2) whether there is a rational relationship between the classification andsome legitimate legislative purpose. City of Aberdeen v. Meidinger, 1975, S.D., 233 N.W.2d 331.

The statutory classification in question in question is based upon residency in counties containing state educational institutions, i.e., individuals residing in such counties may not serve on the Board of Regents. Viewing this classification in terms of the traditional test of reasonableness as opposed to the strict scrutiny test,[3] the fact that the state has distinguished between citizens in such a manner does not render the classification unreasonable or arbitrary. Morrill argues that the use of county boundaries is totally arbitrary because they are not viable dividing lines in a contemporary social and economic context. The fact that the legislature chose county boundaries instead of some other more precise means of classification does not concern us. Perhaps we in our collective wisdom could conjure up some more expedient and rational means of accomplishing the legislative purpose, but this is not our function. The wisdom, policy, necessity, expediency and methods of carrying out the legislative purpose are for the legislature. We are only concerned with the constitutionality of an act, and, as long as there is a rational relationship between the legislative purpose and the classifications, we will not intervene. McDonald v. School Bd. of Yankton, supra;

3. At best, sitting on the Board of Regents is a privilege granted by the legislature and could not be deemed to be a fundamental right or suspect classification which calls for strict judicial scrutiny requiring a compelling state interest to justify the classification. See, Behrns v. Burke, 1975, S.D., 229 N.W.2d 86,88, n.7.

Behrns v. Burke, 1975, S.D., 229 N.W.2d 86. The legislature has examined this statute on several occasions when all of the shortcomings of using county boundaries as a criterion have been presented. No change has been made, and the court's venture into this area would be trepassing on legislative authority. Accordingly, we are not compelled to conclude that the statute sets up arbitrary classifications among the state's citizens.

The stated objective or legislative purpose for the residency requirement in the statute has been discussed for years and its merits debated extensively. If appointees to the Board of Regents could reside in counties containing state educational institutions, considerable political pressure would be brought to bear on the Governor to have each of those institutional counties represented. The statute further attempts to maintain the objectivity and integrity of the Board of Regents and to insulate the Board to the extent possible from localized pressures by preventing the appointment of institutional representatives and by protecting against overzealous appointees becoming champions of institutions located in the counties from which they are appointed. The statute also minimized the temptation that would exist for a regent in an institutional county to become involved in the daily administrative functions of the institution. We find that these considerations constitute a legitimate legislative purpose, and we conclude that there is a rational relationship between this legitimate legis-

lative purpose and the classification based upon residency in counties containing state educational institutions.

We can find no violation of constitutional dictates "so plain and palpable to admit of no reasonable doubt." Based upon the foregoing conclusions, we hold that the residency requirement in SDCL 13-49-2 does not violate the equal protection of the law guarantees prescribed in the Fourteenth Amendment of the United States Constitution and Article VI, § 18 of the South Dakota Constitution.

Accordingly, a judgment shall issue declaring a vacancy on the Board of Regents.

MORGAN, Justice, and HALL and WILDS, Circuit Judges, concur.

ZASTROW, Justice, dissents.

HALL, Circuit Judge, sitting for WOLLMAN, Chief Justice, disqualified.

WILDS, Circuit Judge, sitting for PORTER, Justice, disqualified.

ZASTROW, Justice (dissenting).

I agree with the majority opinion that the residency requirements of SDCL 13-49-2 are not limited to the time of selection but are in fact qualification requirements which continue during the term of each member of the Board of Regents.

I agree that Regent Morrill's standing to challenge the constitutionality should not be prohibited under the rationale of Collins v. Siewert, 1939, 66 S.D. 477, 285 N.W. 518, because the constitutionality of the statute in question is of such great interest to the general public that it is within the prerogative of this Court to decide this matter. See Anderson v. Kennedy, 1978, S.D., 264 N.W.2d 714.

However, having agreed to decide the constitutionality of the statute, the majority reaches what I consider to be an erroneous conclusion. It is my opinion that the residency requirement of SDCL 13-49-2 establishes an arbitrary classification which rests upon a basis of difference which has no fair and substantial relation to the purpose of the legislation; and, therefore, is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution (Reed v. Reed, 1971, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225), and Article VI, § 18 of the South Dakota Constitution (City of Aberdeen v. Meidin-

ger, 1975, S.D., 233 N.W.2d 331).[1]

In Meidinger, this Court stated that "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." 233 N.W.2d at 334. In Meidinger the court found that there was no legitimate legislative purpose for the classification, and thus obviously there could be no rational relationship between the classification and the none-existent legislative purpose.

It is not my intent to indicate that the legislature may not prescribe qualifications for the office; that it can set qualifications which have a recognized rational basis, such as age, integrity, training or residency is well established. Harper v. Virginia State Bd. of Elections, 1966, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169. However, when it seeks to employ a classification of those who meet

1. I agree with the majority that this is not a "fundamental interest" or a "suspect classification" based upon race, religion, national origin or sex which requires a strict scrutiny test; but is to be considered by the rational-relation test.

the prescribed qualification, the classification must be nondiscriminatory and meet the equal protection requirement that it be based upon a realistic and substantial difference having a reasonable relationship to the purposes sought to be accomplished by the legislation. Quaker City Cab Co. v. Commonwealth of Pennsylvania, 1928, 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927. There seems to be little question that the nonresidency requirement of SDCL 13-49-2 sets up a classification which must satisfy the equal protection requirement.

First, we must determine what is the legislative purpose of the nonresidency classification. The majority opinion declares that the legislature's purpose was (1) to avoid the political pressure upon the governor to select regents from each of the institutional counties; (2) to insulate the Board from localized pressure by preventing appointment of institutional representatives; (3) to protect appointees from becoming champions of institutions located in their own counties; and (4) to minimize regents from interfering in the daily administrative functions of a local instituion. The respondent, Governor Wollman suggests a futher purpose, i.e., that the socio-economic pressures upon a regent follows county boundaries.

This Court said in Behrns v. Burke, 1975, S.D., 229 N.W.2d 86, that although we will not substitute "[our] judgment for that of the legislature regarding the

wisdom of the statutory purpose-it is an examination by this court to ensure that the persons affected by a statute are those that should be reached to achieve the desired legislative ends." 229 N.W.2d at 89. In other words, the court will accept any legitimate legislative purpose without substituting its wisdom for the legislature's.[2] But the court must then continue on and must examine and determine whether the basis of the classification of the citizens into eligibles (i.e., those residing without an instituional county) and ineligibles (i.e., those residing within an institutional county) bears a "real and substantial difference having a reasonable relationship to the [purposes] sought to be accomplished by the legislation." Reed v. Reed, supra. The majority simply concludes that the statute does exclude people who are subject to these influences and therefore accomplishes the legislative purpose. That is certainly true, but that is not enough.

Is it realistic, rational, and resonable to exclude some 40% of the population of the state to accomplish those

2. Except, of course, in situations such as City of Aberdeen v. Meidinger, 1975, S.D., 223 N.W.2d 331, where the court can find no legitimate legislative purposes.

purposes? Is there a realistic, rational and reasonable difference that distinguishes 100,000 plus citizens residing within the confines of Minnehaha County and those well-known citizens within the city limits of Sioux Falls, but residing within the boundaries of Lincoln County? Are all these people so affected by the influences that they must be reached to achieve the desired legislative ends?

Is the statutory classification realistic, rational and reasonable if it excludes the citizens of Wall and Quinn, 50 to 60 miles from the School of Mines in Rapid City, because they may be subject to these influences but the residents of Piedmont, who are within a few miles of the School of Mines but just inside the Meade County line, are not? Certainly the economic life of the citizens of that community are much more dependent upon Rapid City and the state institution located there than those many citizens of distant eastern Pennington County.

Can it be said that there is reasonable and rational difference between a Butte County resident residing as near as five miles from the Black Hills State College campus, and a Nemo resident, forty miles distant from the campus, simply because of the location of the county boundaries?

The best example of the unrealistic and unreasonableness of the classification may involve residents of the city of Irene.

The city is trisected by the boundaries of Clay, Turner and Yankton Counties. The eligibility of the otherwise qualified citizen to serve as a regent is simply decided by the side of the street upon which he lives, and none of the legislative purposes are reasonably served.

The examples can be made for each county and institution. Time and space prohibits the examination of each of the counties and institutions involved. But the real question in each instance is whether county boundaries, established in the late 1800's, provide a realistic, rational and reasonable basis for the classification of those persons otherwise qualified to be selected to the Board of Regents. In my opinion the answer is NO! The influences and pressures will be upon any member appointed to the Board of Regents. If the member is concerned, as he/she should be, about the future of higher education <u>in the state</u> the influences and pressures <u>will not</u> affect their vote. If the member lacks that concern and is susceptible to such influence and pressure it matters little where his county of residence is.

I would deny the writ of quo warranto and find that the provision of the statute requiring that member of the Board of Regents "shall (not) reside in the county in which any state educational instituion is located" is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constituion and

Argicle VI § 18 of the South Dakota Constitution.

Although, there are methods this Court could suggest which would result in more realistic classifications, that is not our function. It is the responsibility of the legislature to clearly identify the objectives of the qualifications and then establish the classifications upon real and substantial differences havings a reasonable relationship to the objectives sought to be accomplished. It may be necessary for the legislature to address each instituion and the socio-economic area surrounding it to establish the necessary classifications. It may be that one type of classification will not meet the legislative purposes sought when applied to each instituion. However, the legislature should not be allowed to retain the present arbitrary and unconstitutional classifications because reasonable and rational classifications may be difficult to enact because of political considerations.

APPENDIX B

JUDGMENT

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

****

Present: Acting Chief Justice Francis G. Dunn and Associate Justices Laurence J. Zastrow and Robert E. Morgan and Circuit Judge Philo Hall sitting for Chief Justice Roger L. Wollman, disqualified, and Circuit Judge John L. Wilds sitting for Associate Justice Donald J. Porter, disqualified:

DAVID E. MORRILL,

Petitioner,

vs.

HARVEY WOLLMAN, Governor
of the State of South Dakota,

Respondent.

****

JUDGMENT
#12580 FILED:
November 7, 1978

The above entitled matter having come on regularly for determination by this Court upon respondent's counterclaim

challenging the petitioner's right to hold the office as a member of the Board of Regents of the State of South Dakota, and the issue having been joined and a full hearing having been had thereon before the Court on October 18, 1978, and the Court being fully advised in the premises and having made and filed its written opinion herein, now, therefore, good cause appearing, it is

ORDERED, ADJUDGED and DECREED that the petitioner, David E. Morrill, has forfeited his office as a member of said Board of Regents, that he is hereby ousted and excluded from such office and from the powers, privileges and emoluments thereof and that a vacancy now exists on said Board of Regents.

DATED at Pierre, South Dakota, this 7th day of November, 1978.

BY THE COURT

/s/ Francis G. Dunn
Acting Chief Justice

ATTEST:

/s/ Gloria J. Engel
Clerk of the Supreme Court
(SEAL)

APPENDIX C

ORDER DENYING PETITION FOR REHEARING AND MOTION FOR A STAY ON ISSUANCE OF WRIT OF QUO WARRANTO

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

****

DAVID E. MORRILL,
Petitioner,

vs.

HARVEY WOLLMAN, Governor or the State of South Dakota,
Respondent.

****

ORDER DENYING PETITION FOR REHEARING AND MOTION FOR A STAY ON ISSUANCE OF WRIT OF QUO WARRANTO

****

FILED: November 9, 1979

****

A petition for rehearing in the above cause having been filed on this date, and no issue or question of law or fact appearing to have been overlooked

or misapprehended, and a written statement having been filed by a majority of the Court indicating that they would not grant the petition for rehearing nor the motion for a stay on issuance of writ of quo warranto also filed on this date, now therefore, it is

ORDERED that the petition for rehearing and the motion for a stay on issuance of writ of quo warranto be and they hereby are denied.

DATED at Pierre, South Dakota, this 13th day of November, 1978.

BY THE COURT:

/s/ Francis G. Dunn
Acting Chief Justice

ATTEST:

/s/ Gloria J. Engel
Clerk of the Supreme Court

(SEAL)

APPENDIX D

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

****

DAVID E. MORRILL,

Petitioner,

vs.

HARVEY WOLLMAN, Governor of the State of South Dakota,

Respondent.

****

No. 12580

****

Filed with the Clerk of the Supreme Court of South Dakota on the 17th day of November, 1978.

****

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that David E. Morrill, the Petitioner above named, hereby appeals to the Supreme Court of the United States from the final judgment

of the Supreme Court of the State of South Dakota granting Respondent's counterclaim for a Writ of Quo Warranto entered in this action on the 7th day of November, 1978.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated this 16th day of November, 1978.

/s/ Bruce A. Hubbard
BRUCE A. HUBBARD
Attorney for Petitioner
P. O. Box 580
Sturgis, South Dakota
57785

/s/ David E. Morrill
DAVID E. MORRILL
Petitioner and Attorney
Pro se
P. O. Box 8108
Rapid City, South Dakota
57701

CERTIFICATE OF SERVICE

I, BRUCE A. HUBBARD, Attorney for the Petitioner in the above-entitled matter, do hereby certify that I mailed a true and correct copy of the within and foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES to Charlen B. Kornmann, Special Assistant Attorney General, P. O. Box 489, Aberdeen, South Dakota 57401 on the 16th day of

November, 1978, by depositing said copy in the United States mail at Sturgis, South Dakota, first-class postage prepaid, in an envelope addressed to said addressee.

Dated this 16th day of November, 1978.

/s/ Bruce A. Hubbard
BRUCE A. HUBBARD

APPENDIX E

Affidavit of Ralph J. Brown

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

****

DAVID E. MORRILL,

Petitioner,

vs.

HARVEY WOLLMAN, Governor of the State of South Dakota,

Respondent.

****

AFFIDAVIT OF RALPH J. BROWN

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF CLAY)

Comes now Ralph J. Brown, and upon his oath deposes and says as follows:

That he is a Professor of Economics at the School of Business, University of

South Dakota, Vermillion, South Dakota.

That he was born June 2, 1944 and is presently married with two children.

That he received a Bachelor of Science degree in Economics from Northern State College in Aberdeen, South Dakota in 1967. That he received a Master of Science in Economics at South Dakota State University in Brookings, South Dakota in 1968. That he received a Ph.D. in Economics at the University of Colorado, Boulder, Colorado in 1970.

That his teaching experience is as follows: Teaching Assistant, University of Colorado, 1968-1970; Assistant, Associate and Professor of Economics, Northern State College, 1970-1977; Professor of Economics, University of South Dakota, 1977-Present.

That he is a member of the American Economic Association, Midwest Economic Association, South Dakota Social Science Association, and South Dakota Council on Economic Education, Board of Trustees. That he has served as an Economic Advisor to the Governor's Council for Tax Decision, 197101972; Economic Advisor to the Governor's Task Force on Economic Development, 1972; Board of Trustee of South Dakota Economic Education Association, 1973; Member of Academic Resources Council-Advisory Board to State of South Dakota; and constructed Agricultural Econometric Model of South Dakota under contract with the South Dakota State Planning Bureau, Summer 1977.

That he has a work in progress on a monograph entitled <u>The South Dakota Econometric Model</u> for the Business Research

Bureau of the School of Business, University of South Dakota, Vermillion, South Dakota. That he prepared a study which was presented in testimony before the Federal Power Commission in Washington, D.C., January 1977 involving the economic impact on natural gas curtailments in Montana-Dakota Utility Service area.

That he has testified in Federal and State Court on seven different occasions and has been a consultant to attorneys on the estimation of economic loss due to personal injury or loss of business profits.

That his Master's Thesis was entitled Patterns of Change in the Spatial and Functional Aspects of Trade Centers and Trade Areas in South Dakota.

That it is your affiant's contention in this Affidavit that the county unit in South Dakota is not a meaningful unit for understanding or analyzing the economic or social relationships in the State. More specifically it is contended that in the Rapid City area the relevant unit for understanding the economic and social interactions of that community greatly transcend county lines and that the residents of Pennington county, in general, are no more or less affected by the operation of State educational institutions in that city than are the residents of the surrounding counties. Consequently, any discrimination predicated upon county lines as a meaningful unit of economic or social influences are necessarily arbitrary and lack coherence with the economic and social realities of the time.

The county is a 19th century political artifact which is not well adapted to the technology and socioeconomic environment of the late 20th century. In the almost 100 years since the county lines were originally drawn, changes in the South Dakota economy have greatly increased the size of the respective trade areas or zones of influence of the major cities of South Dakota.

In the late 19th century, when the original county lines were set, many small towns dotted the countryside and served as centers for a vaiety of economic, social and political activities of the surrounding population. These small towns were generally accessible within a day's drive with a horse and buggy and constituted a relatively self-sufficient economy and social system for the area. In most cases it was the county seat town that provided the bulk of the business establishments with facilities for buying and selling goods and services, churches, education, health care, and local government functions. Therefore, in a day when agriculture consisted of relatively small farms, transportation was slow, and merchandising was on a small scale, the county unit and the county seat town probably constituted a relevant basis for the demarcation of economic and social relationships. That time, however, is long past.

The major influences which have greatly expanded the zones of influence or trade areas beyond the county line unit are as follows:

1. The transformation of agriculture

in which the substitution of capital for labor has precipitated the off-farm migration and, as a result, left fewer persons in these areas to support the many small towns. This has increased the reliance of many rural residents on the larger towns in their areas.

2. The advent of the automobile and improved roads and highways has enabled the rural resident to travel to larger cities where variety is greater and prices are often lower to do their shopping in a fraction of the time it took in the 19th century. This has made the county line meaningless as a demarcation of economic and social influences.

3. Advances in technology have required the expansion in the size or scale of operation of many activities to take advantages of the economies of scale that accrue to larger units. This is not only the case in the size of business establishments, but also in local government services, churches, schools, and the provision of health care facilities as well. Consequently, many small communities found it difficult to compete with larger towns and in the process many of these functions were absorbed by the larger towns.

4. Finally, with rising incomes the needs and desires of the people of South Dakota have also risen. Few South Dakota families would find all the consumer goods and services and social activities they desire and require

available in a town of 5,000. Consequently, persons in these communities find that they must frequently travel to larger cities which offer a greater variety of goods and services needed by the modern South Dakota family. This, of course, means that zones of influence or trade areas of cities like Rapid City have expanded well beyond the county line.

Economists[1], geographers[2], and sociologists[3] have all considered the problem of delineating the principal area in which a particular city is a dominant influence on the economic and social lives of the population. A variety of terms have been used to describe this primary zone of influence of a city, but we will use the term trade area to describe this area. The trade area of a city can be viewed as a relatively self-contained unit in terms of economic and social relationships. The trade area provides a complete line of shopping goods and services, a labor market, a variety of social activities for the area, a full range of health care facilities, and a full range of government functions. The size of the trade area varies directly with the size of the city and inversely with the population density of the area.

The Rapid City trade area is very large reflecting the relative size of the city in the area and the low population density of western South Dakota. Several studies have been made of the Rapid City trade area and they all agree

that the dominant area of influence of that city is far beyond the Pennington county line. One important study which defines trade centers and trade areas of the Upper Midwest is a study by Borchert and Adams[4] for the Upper Midwest Research and Development Council. In this study they classified all the trade centers in the Upper Midwest and delineated the trade areas served by the major trade centers. The trade centers were classified according to the variety and amount of retail and wholesale business done within the community. The five types of retail centers from lowest to highest are hamlets, minimum convenience centers, full convenience centers, partial shopping centers, and complete shopping centers. In addition, complete shopping centers which provided additional wholesale functions were distinguished further as secondary or primary wholesale-retail centers.

Of interest in this case is the designation given both Sturgis and Rapid City. Sturgis was classified as a partial shopping center and Rapid City a secondary wholesale-retail center. A partial shopping center provides a number of retail functions, but does not offer complete shopping opportunities. Consequently, residents must travel for some goods and services to a larger trade center which in this case is Rapid City. A secondary wholesale-retail center provides a complete range of retail shopping goods and services plus an array of wholesale functions.

The Upper Midwest study also delineated trade areas for all the complete

shopping centers of the Upper Midwest which includes Rapid City. Sturgis was included as a part of the Rapid City trade area. It is apparent from this study that the trade area or dominant zone of influence of Rapid City is much larger than Pennington County.

Another study of the Rapid City trade area carried out by geographers at the University of Chicago[5] shows that the Rapid City trade area is one of the largest trade areas in the Midwest in terms of square miles of area primarily because of the low population densities of western South Dakota. Furthermore, they state that:

> Comparing the functions of centers in Iowa and South Dakota, we see that towns in the latter, at lower densities of population can no longer provide the following businesses: furniture stores, appliance sales, variety stores, insurance and real estate brokers, movers and haulers, funeral homes, doctors, and dentists. Similarly, the simplest facilities of local government, farm implement dealers, and barber and beauty shops are no longer found in the villages, but have centralized to the towns.
>
> The reason for this upward shift of functions to centers at higher levels of the hierarchy as population densities drop is as follows. To maintain a given array of activities, market areas must increase in size in direct proportion to the drop in population densities; the maximum distance consumers are willing to travel to the

center must increase in similar proportion to the density decline. Evidently consumers are willing to travel further where densities are lower, for movement will generally be easier where people are fewer and congestion is less, so that the economic reach of centers does increase.[6]

Basically, they point out that in low population density areas like that of western South Dakota the many functions that normally are available in the small communities in other states have been shifted upward to the larger communities. This means that the consumers must travel further distances and the trade areas of these larger cities must accordingly be very large. This is exactly the case in western South Dakota where the Rapid City trade area is very large in size. So in low population density areas such as western South Dakota the county unit is even less relevant as a cohesive unit capturing the basic economic and social relationships of the community.

Finally, the State of South Dakota has also recognized the inappropriateness of the county unit for purposes of economic and social planning when it established the multi-county Planning and Development Districts with the Executive Order issued by the Governor on December 4, 1970.

---

[1]Walter Christaller, Die zentralen Orte in Suddentschland, (Jena: Fischer, 1933; August Losch, Die raumliche Ordung der

Wirtschaft (Jena: Fischer, 1941); Karl A. Fox, "Delineating Functional Economic Areas, "Research and Education for Regional and Area Development (Ames: Iowa State University, 1966); and Ralph J. Brown, Patterns of Change in the Spatial and Functional Aspects of Trade Centers and Trade Areas in South Dakota, (M.S. Thesis, South Dakota State University, 1968.

[2]Brian J. L. Berry, Geography of Market Centers and Retail Distribution (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1967) and J. R. Borchert and R. B. Adams, Trade Centers and Trade Areas of the Upper Midwest, Urban Report No. 3, Upper Midwest Economic Study (Minneapolis: University of Minnesota, 1963).

[3]Douglas Chittick, "Gorth and Decline of South Dakota Trade Centers, 1901-51," South Dakota State College Agricultural Experiment Station Bulletin, 448, (1955).

[4]Borchert and Adams, op. cit., pp. 2-12

[5]Berry, op. cit.

[6]Ibid., pp. 30-39.

/s/ RALPH J. BROWN

Subscribed and sworn to before me this 10th day of October, 1978.

/s/ NOTARY PUBLIC

APPENDIX F

Affidavit of F. Gordon Foster

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

****

DAVID E. MORRILL,

Petitioner,

vs.

HARVEY WOLLMAN, Governor of the State of South Dakota,

Respondent.

****

AFFIDAVIT

STATE OF SOUTH DAKOTA

COUNTY OF HUGHES

I, F. Gordon Foster, being first duly sworn depose and state that:

The South Dakota Board of Regents has under its control nine institutions with

main campuses located in eight different South Dakota counties as follows:

Black Hills State College	Lawrence County
Dakota State College	Lake County
Northern State College	Brown County
South Dakota School for the Deaf	Minnehaha County
South Dakota School for the Visually Handicapped	Brown County
South Dakota School of Mines and Technology	Pennington County
South Dakota State University	Brookings County
University of South Dakota	Clay County
University of South Dakota/Springfield	Bon Homme County

The Board of Regents also has the Commissioner's Office with a permanent staff located in the Richard F. Kneip Building in Hughes County.

A number of the Regental institutions carry on programs and maintain offices with permanent staff in counties other than the county in which the main campus is located. South Dakota State University, through the Cooperative Extension Service of its College of Agriculture and

Biological Sciences, Maintains offices in sixty-four counties in the state. County extension agents, home economists, and secretarial staff are in these offices and offer extended university services and programs. In the three unorganized counties of the state, Shannon, Todd, and Washabaugh, services are rendered by the staff of the counties to which the unorganized counties are attached.

South Dakota State University also operates experimental farms and ranch activities at sites in Harding County, Hyde County, Union County, Spink County, Jackson County, and Charles Mix County, none of which include a Regental main campus within its borders.

The University of South Dakota Medical School maintains staff and offices in Yankton County, in Meade County, and in Fall River County in addition to other counties in which there are Regental institutions. A recent federal grant was awarded to the USD Medical School over an eight year period based on the establishment of area health education centers in five South Dakota counties including Pennington, Hughes, Brown, Minnehaha, and Yankton. Each of the AHEC's will be used to service all contiguous South Dakota counties as well as the central site county. This involves 23 counties other than AHEC site locations and which do not have a main Regental institution.

The University of South Dakota also employs staff and supervisory personnel to operate a satellite nursing program in Todd County and Shannon County.

USD and SDSU operate a public television network with transmission towers in Walworth, Meade, Lyman, and Washabaugh counties.

Black Hills State College is directly affiliated with Sinte Gleska Community College and Oglala Sioux Community College through credit granting, supervision, and federal grants with program and staff in Todd, Tripp, Gregory, Mellette, Bennett, Shannon, and Washabaugh counties.

Northern State College operates similarly with the Cheyenne River Reservation in Dewey County and Ziebach County.

One or more of the above listed programs and/or activities involves every county in South Dakota.

Dated this third day of October, 1978, at Pierre, South Dakota.

/s/ F. GORDON FOSTER

Subscribed and sworn to before me, a Notary Public, this 3rd day of October, 1978.

/s/ BEVERLY JENNINGS
Notary Public, South Dakota

Supreme Court, U. S.
FILED
APR 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1219

DAVID E. MORRILL,

Appellant,

v.

WILLIAM J. JANKLOW, GOVERNOR
STATE OF SOUTH DAKOTA

Appellee.

ON APPEAL FROM THE

SUPREME COURT OF SOUTH DAKOTA

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1219

DAVID E. MORRILL,

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v.

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STATE OF SOUTH DAKOTA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1219

DAVID E. MORRILL,

Appellant,

v.

WILLIAM J. JANKLOW, GOVERNOR
STATE OF SOUTH DAKOTA

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF SOUTH DAKOTA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, this Motion to Dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of South Dakota is filed on behalf of the Governor of South Dakota.

The appeal presents no substantial federal question. The qualifications for eligibility to serve on the South Dakota Board of Regents which the South Dakota Supreme Court has here sustained are well within the framework of permissible state regulation which this

Court has previously upheld in cases coming from other states. Appellant's contention that the challenged portion of the statute in question establishes an arbitrary classification between South Dakota citizens is without basis in fact. Accordingly, plenary consideration of the case by this Court is not warranted.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE.

A.

THE STATUTE

The appeal raises the question of the validity of SDCL 13-49-2 of the South Dakota Codified Laws.

This statute provides in relevant part that members of the governing board for all state educational institutions who are regular members shall be persons of probity and wisdom and selected from among the best known citizens, residents of different portions of the state, none of whom shall reside in the county in which any state educational institution is located, all of whom shall not be members of the same political party.

B.

THE PROCEEDINGS BELOW

The Appellant was appointed to serve as a member of the State Board of Regents on January 30, 1975. At the time of his appointment he was a Meade County resident. In August, 1978, Appellant

moved to Pennington County wherein a state institution under the jurisdiction of the Board of Regents is located. Appellant filed an application for a Writ of Prohibition in anticipation of the Appellee's declaration pursuant to SDCL 13-49-2 that a vacancy on the state board existed and needed to be filled. The Appellee answered the application for Writ of Prohibition and counterclaimed for a Writ of Quo Warranto challenging Appellant's right to hold office.

In an original proceeding before the South Dakota Supreme Court, jurisdiction over Appellant's application for Writ of Prohibition was declined while the South Dakota Supreme Court exercised jurisdiction over the counterclaim for a Writ of Quo Warranto. The South Dakota Supreme Court, holding that SDCL 13-49-2 does not violate the equal protection of the law guarantees prescribed in the Fourteenth Amendment of the United States Constitution or Article VI, § 18 of the South Dakota Consitution, declared that a vacancy existed on the South Dakota Board of Regents.

II.

ARGUMENT

THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION WARRANTING REVIEW BY THIS COURT.

The United States Supreme Court has held that the Fourteenth Amendment to the United States Constitution permits the States a wide scope of discretion in enacting laws which affect some groups of citizens

differently than others. McGowan V. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

The statutory classification in question is based on residency in counties containing state educational institutions, i.e., individuals residing in such counties may not serve on the South Dakota Board of Regents. Appellant contends that this classification violates his Equal Protection rights under the Federal Constitution. Appellant further contends that, applying the traditional equal protection test, the classification established by SDCL 13-49-2 is an arbitrary one without a rational basis to a legitimate state objective.

At best, sitting on the Board of Regents is a privilege granted by the Legislature and could not be deemed to be a fundamental right rooted in the Constitution. Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966). The test of strict judicial scrutiny is reserved for cases involving laws which operate to disadvantage suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the Constitution. San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); Rehearing denied, 411 U.S. 959, 93 S.Ct. 1919, 36 L.Ed.2d 418. Therefore, use of traditional equal protection analysis is mandated.

Under traditional equal protection analysis, a mere classification by itself is not enough to establish a violation of the Equal Protection Clause of the 14th Amendment. Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). A legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. United States Department of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. McGowan v. Maryland, supra. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A state statute should not be set aside if any state of facts reasonably can be conceived to justify it. McGowan v. Maryland, supra. Statutes should be construed whenever possible so as to uphold their constitutionality. United States v. Vuitch, 402 U.S. 62, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971).

The legislative purpose or objective for the residency requirement in SDCL 13-49-2 has been debated frequently and extensively in the State Legislature in the past years. The main purpose of imposing residency requirements is to maintain the objectivity and integrity of the Board. If appointees to the Board of Regents could reside in

counties containing state educational institutions, considerable political pressure would be brought to bear on the Governor to have each county containing an educational institution represented. The statute in question further attempts to insulate the Board to the extent possible from localized pressures by preventing the appointment of institutional representatives and by protecting against overzealous appointees becoming champions of institutions located in the counties from which they are appointed. The statute also minimizes the temptation that would exist for a regent in an institutional county to become involved in the daily administrative functions of the institution.

The Appellant argues that the use of county lines by the legislature to accomplish its legislative purpose is totally arbitrary. Under the traditional equal protection rational-basis standard, this Court has held that perfection in making the necessary classification is neither possible nor necessary. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). That the State Legislature chooses not to determine a more precise method of obtaining an objective Board is not to say that the objective of preserving the objectivity and integrity of the Board is not rationally furthered by the requirements found in SDCL 13-49-2. It is only to say that with regard to the interest of all concerned, the State has perhaps not chosen the best means to accomplish this purpose. But

where rationality is the test, a state does not violate the Equal Protection Clause merely because the classification made by its law is imperfect.

The fact is that the South Dakota statute involved contains a classification which is rationally related to a legitimate legislative objective. The appeal, therefore, presents no substantial federal question warranting plenary review by this Court.

III.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the appeal should be dismissed or in the alternative, to affirm the judgment entered in the cause by the Supreme Court of the State of South Dakota.

Respectfully submitted,

MARK V. MEIERHENRY
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

Service of the Motion to Dismiss or Affirm was made this 20th day of April, 1979, by depositing same in a United States mailbox, with first class postage prepaid, addressed to Mr. Bruce A. Hubbard, Post Office Box 580, Sturgis, South Dakota 57785.

In addition, I hereby certify that all parties required to be served have been served.

Dated this 20th day of April, 1979.

MARK V. MEIERHENRY
ATTORNEY GENERAL

State of South Dakota